IN THE

Supreme Court of the United States

October Term, 1956
No. 92

RUDOLPH SCHWARE,

Petitioner,

vs.

BOARD OF BAR EXAMINERS OF THE STATE OF NEW MEXICO,

Respondent.

Motion for Leave to File Brief of Harriet Buhai as Amicus Curiae and Brief Amicus Curiae.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Miss Harriet Buhai hereby moves for leave to file a brief on the merits as amicus curiae in *Schware v. Board of Bar Examiners of the State of New Mexico,* No. 92 on the current docket of this Court, in which certiorari has been granted by this Court. Said motion is made pursuant to Rule 42(3) of this Court.

Movant has attempted to obtain the consent of the parties to the filing of such a brief. Petitioner has indicated his consent thereto but counsel for respondent has refused to consent.

Nature of the Movant's Interest.

Miss Buhai is vitally interested in the disposition of the present case because certain of the crucial issues[1] contained therein are akin to issues involved in her present efforts to obtain admission to the Bar of the State of California. She has passed a California bar examination and otherwise complied with the educational requirements of the California Bar, but the State Committee of Bar Examiners has refused to certify her for admission thereto because of: (1) her past membership in the Communist Party and certain other organizations, and (2) her refusal to name the individuals with whom she associated during the period of her Party membership.

Miss Buhai was called to testify before a sub-committee of the State Bar because of information which had been received to the effect that she had been a member of the Communist Party and certain other organizations. She testified fully and freely as to the commencement and termination of her Party membership sometime prior to her taking her said Bar examination and as to the innocent nature of her activities therein during such membership period; she refused, however, to name any persons with whom she had associated during the period of her membership on the ground that to do so would harm innocent individuals.

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[1]Two of the grounds relied on by the Court below in the present case—criminal arrests and use of aliases—were not present in Miss Buhai's case.

At the conclusion of an examination by a sub-committee and full Committee of Bar Examiners of the State Bar, Miss Buhai was refused certification on the grounds above stated; she filed a petition for hearing in the Supreme Court of the State of California, which is now pending. A crucial issue in that petition[2] concerns the right of the State Bar to refuse admission to movant on the basis of her past membership in the Communist Party, which is likewise one of the central issues in the *Schware* case. Since this Court's disposition of that issue in the *Schware* case may well affect the ultimate outcome of Miss Buhai's case, she regards it as essential that all questions be fully and adequately presented to this Court in the present case and hence moves for leave to file the annexed brief as Amicus Curiae.

Questions That Will Not Be Adequately Presented by the Parties.

On the basis of an examination of the Petition for Certiorari in this case, and the Response thereto, movant believes that a vital question of law has not been and will not be adequately presented by the parties. That question is whether Petitioner Schware's right of free political association has been infringed by the action of the State Bar in denying him admission.

We shall attempt to demonstrate first, that there is a constitutionally protected right of free political association; and secondly, that the Committee of Bar Examiners

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[2]Miss Buhai has also raised other constitutional issues.

in the present case has infringed that right by virtue of its intrusion into the area of past political associations and its refusal to admit petitioner on the basis thereof. We shall further attempt to show that this right of free political association has deep constitutional and historical roots and is also of great pertinent and contemporary value.

ISAAC PACHT,
CLORE WARNE,
STANLEY FLEISHMAN,
By CLORE WARNE,
Attorneys for Amicus Curiae.

IN THE

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OCTOBER TERM, 1956.

No. 92.

RUDOLPH SCHWARE,

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vs.

BOARD OF BAR EXAMINERS OF THE STATE OF NEW MEXICO,

Respondent.

BRIEF AMICUS CURIAE.

Summary of Argument.

The present case involves a serious violation of Petitioner's right of free political association.

One of the most valued and important rights of a citizen of a free country is the right to freely affiliate and associate with groups organized and acting for political purposes. Once political views are translated into action, in the form of sabotage, violence, etc., the government may, of course, intervene; but as long as a group of individuals operates at the level of advocacy and persuasion, governmental intervention or inquiry should not be sustained.

This right of free political association is deeply rooted in the history and traditions of our country. It has been recognized since the earliest days of our Republic. It has been ratified by consistent practice down through the years. Moreover, it is of inestimable value and importance at the present time; it serves as the foundation for the various political groupings which play such an important role, through political education and otherwise, in our present complex society, and likewise serves as the only effective means of voicing political dissent.

It is not surprising, therefore, to find that the courts have recognized that this right of political association is constitutionally protected. In part, such protection is inherent in the very nature of our constitutional democracy; in part, it flows from the fundamental guarantees contained in the Bill of Rights.

The existence of this right of free political association creates an area of political activity as to which no governmental or quasi-governmental agency may inquire, and into which no such agency may intrude. Yet that is precisely what the State Bar Committee has done in the present case in refusing admission to Petitioner on the basis of his past membership in the Communist Party. This action of the State Bar, which was upheld by the Supreme Court of New Mexico, therefore constitutes an unwarranted invasion of Petitioner's constitutionally protected right of political association.

ARGUMENT

I.

Freedom of Political Association Has Deep Historical Roots.

The Right of Free Political Association Was Well Recognized in the Formative Era of Our Country.

Abroad, it was reflected in the principles enunciated by the French Revolutionists of the period, whose writings had such tremendous impact on our own political theorists. It received strong support in England by consistent acquittals in prosecutions under the then English statute of sedition.

See, *e. g.*,

Sutherland, *British Trials for Disloyal Association During the French Revolution,* 34 Cornell L. Q. 303 (1949).

A similar attitude was voiced by our own political theorists, for as Schattschneider observes:

> ". . . The authors of the Constitution refused to suppress the parties by destroying the fundamental liberties in which parties originate. They or their immediate successors accepted amendments that guaranteed civil rights and thus established a system of party tolerance, *i. e.*, the right to agitate and to organize. . . ."

Schattschneider, *American Government in Action* (1942), p. 7.

Thus, Madison, while explaining in the celebrated tenth paper of the *Federalist* how the new Constitution was designed to mitigate certain evils of faction, was careful to point out that liberty of association must remain unfettered in the new democracy.

"There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

"There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

"It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."

Beard, The Enduring Federalist, pp. 68-69.

Moreover, Madison himself recognized that political associations were inevitable in a democracy. (*The Enduring Federalist, supra,* pp. 69-70.) Indeed, such associations as the Boston Caucus Club[1] ante-dated our Republic,

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[1]". . . At any rate, early in our history small groups began to act in concert by agreeing on candidates and policies they would support before the electorate as a whole. An early example of this sort of activity was recorded in February, 1763, by John Adams in his diary:

"This day I learned that the caucus club meets at certain times in the garret of Tom Dawes, the adjutant of the Boston regiment. He has a large house, and he has a moveable partition of his garret, which he takes down, and the whole club meets in one room. There they smoke tobacco till you cannot see from one end of the room to the other. There they drink flip, I suppose, and there they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, collectors, firewards, and representatives are regularly chosen before they are chosen in the town.'" Key, *Politics, Parties, and Pressure Groups* (3d ed.) 1952, pp. 217-218.

and others, such as the Federalist and Republic movements, developed shortly after its formation.

Thus, DeTocqueville, commenting on the American scene a mere half century after the adoption of the Federal Constitution, stressed the importance which the right of free political association had assumed in America even at that early date:

> "In America the liberty of association for political purposes is unbounded. . . . .
>
> * * * * * * * *
>
> "It must be acknowledged that the unrestrained liberty of political association has not hitherto produced, in the United States, those fatal consequences which might perhaps be expected from it elsewhere. The right of association was imported from England, and it has always existed in America; so that the exercise of this privilege is now amalgamated with the manners and customs of the people. At the present time the liberty of association is become a necessary guarantee against the tyranny of the majority. In the United States, as soon as a party is become preponderant, all public authority passes under its control; its private supporters occupy all the places, and have all the force of the administration at their disposal. As the most distinguished partisans of the other side of the question are unable to surmount the obstacles which exclude them from power, they require some means of establishing themselves upon their own basis, and of opposing the moral authority of the minority to the physical power which domineers over it. Thus a dangerous expedient is used to obviate a still more formidable danger.
>
> "The omnipotence of the majority appears to me to present such extreme perils to the American Re-

publics that the dangerous measure which is used to repress it seems to be more advantageous than prejudicial. And here I am about to advance a proposition which may remind the reader of what I said before in speaking of municipal freedom. There are no countries in which associations are more needed, to prevent the despotism of faction or the arbitrary power of a prince, than those which are democratically constituted. In aristocratic nations the body of the nobles and the more opulent part of the community are in themselves natural associations, which act as checks upon the abuses of power. In countries in which these associations do not exist, if private individuals are unable to create an artificial and a temporary substitute for them, I can imagine no permanent protection against the most galling tyranny; and a great people may be oppressed by a small faction, or by a single individual, with impunity. . . .

"It cannot be denied that the unrestrained liberty of association for political purposes is the privilege which a people is longest in learning how to exercise. If it does not throw the nation into anarchy, it perpetually augments the chances of that calamity. On one point, however, this perilous liberty offers a security against dangers of another kind; in countries where associations are free, secret societies are unknown. In America there are numerous factions, but no conspiracies."

1 DeTocqueville, *Democracy in America* (Rev. ed. 1900), pp. 191, 193, 196.

II.

Freedom of Political Association Is of the Utmost Importance Today.

We Need Not Look to History Alone to Justify the Right of Free Political Association, for That Right Is of Inestimable Value in Our Modern Society, Where It Serves as a Core Concept of Our Democratic Theory.

Thus, even groups which have had little chance to elect candidates have made immeasureable contributions in the form of political education. Indeed, many of our currently accepted programs originated with minor party movements, some of which were highly unpopular in their day. As Judge Wyzanski has noted:

> ". . . [T]he heart of the principle of freedom of association is our confidence that by the stimulus of fellowship men will not only realize their full potentialities but will bring to the surface and to fulfillment the new adventurous ideas which the mass has not yet discerned but on which their future progress may be built. Freedom of association like the other basic freedoms looks at all conflicts of opinion and of doctrine *sub specie aeternitatis*. And it is ever mindful of the profound wisdom of Heraclitus' gnome, 'That which opposes, fits. From different tones comes the finest tune.'"
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> Wyzanski, *The Open Window and The Open Door*, 35 Cal. L. Rev. 336, 351 (1947).

Moreover, the right of free political association serves not only as the basis for political parties in the traditional sense, but also as the foundation for the various pressure groups which assert such tremendous influence on legis-

lative and exclusive action in our present complex society. As Professor Abernathy observes:

> ". . . Associations have a place of particular importance in a democracy, whether they are associations of laborers, professional men, or electors and office-seekers. They serve as a training ground for group participation, organization and management of people and programs, and for democratic acceptance of the majority will. They can also serve as a potential influence for improvement of communication between the individual and the government. Concerted demands for action by associations of people have a better chance for accomplishing the desired governmental action than do scattered individual requests. And the information furnished to administrators and legislators by private associations of various kinds is in many instances vital to the intelligent treatment of particular problems."
>
> Abernathy, *Right of Association*, 6 S. Car. Law. Q. 32, 75-76 (1953).

Again, as Professor Abernathy has observed:

> "In addition to the educational and sub-governmental values, there is a third. Associations operate as a check on the tyranny of the majority and at the same time the possible despotism of a few. Both are inherent dangers in a democracy. . . ."
>
> *Right of Association, supra,* 6 S. Car. Law Q. 32, 39.

In short, the present importance of the right of free political association is no less impressive than the pervasiveness of the politically active groups which operate under its aegis.

III.

The Right to Free Political Association Is Constitutionally Protected.

Although there is no express mention of the right to free political association in our Federal Constitution,[1] it is clearly reserved to the people as an inherent part of our constitutional scheme.

It is clear that our Constitution contemplates the reservation of rights in the people in addition to those rights expressly enumerated.

See, *e. g.*, Amendments IX and X.

It is equally clear that among these reserved rights is the right of the individual to function politically in association with others.

Such a right is widely recognized as inherent in our concept of democratic government.

Britton v. Board of Commissioners, 129 Cal. 337, 61 Pac. 1115 (1900);

Sarlls, City Clerk v. State of Indiana, ex rel. Trimble, 201 Ind. 88, 106, 166 N. E. 270 (1929);

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[1]The American Law Institute's *Statement of Essential Human Rights* (1944) provides in Article 5:

"*Freedom to Form Associations.* Freedom to form with others associations of a political, economic, religious, social, cultural, or any other character for purposes not inconsistent with these articles is the right of every one.

"The state has a duty to protect this freedom."

The comment on this Article states in part:

"Provisions for establishing a right comparable to that in this Article are contained in the current or recent constitutions of thirty-nine countries."

Davidson v. Hansen, 87 Minn. 211, 219, 92 N. W. 93 (1902);

State ex rel. Punch v. Kortjohn, 246 Mo. 34, 150 S. W. 1060 (1912);

Starr, *The Legal Status of American Political Parties*, 34 *American Political Science Rev.* 439, 444 (1940);

1 De Tocqueville, *Democracy in America* (Rev. ed., 1900), 196;

Corry, *Elements of Democratic Government* (New ed., 1951), pp. 324-325.

As one writer has observed:

"Without attempting to pin the matter to any particular constitutional guaranty, judges seem willing to hold that the people have an inherent right to organize political parties. The right is held to exist naturally as an incident to free government. It may be impossible to justify this doctrine on a strictly legal basis; but at any rate it is philosophically sound. . . ."

Starr, *The Legal Status of American Political Parties, supra*, at p. 445.

This judicial attitude is reflected in numerous cases.

Thus, in *Davidson v. Hansen, supra*, 87 Minn. 211, the Socialist Labor Party sought to prevent another political organization from placing its nominee for governor on the state ballot under the newly adopted name "Socialist", which was claimed to infringe the label of the Socialist Labor Party. A state statute prohibited political parties from interfering with political titles previously adopted

by other political organizations. The Socialist Party contended that the Socialist Labor Party had ceased to be a political entity entitled to the benefits of the statute because it had polled less than one per cent of the vote at the previous election. In rejecting this contention, the court stated:

> "But a controlling view of this matter lies deeper than the critical interpretation of the language of any statute, for the courts should not interpret any legislative act to authorize an arbitrary power by a political party to exclude the substantial rights of citizens to agitate for the adoption of civic results through partisan efforts and recognized methods. Political agitation is indispensable to the well-being of the government itself. It is necessary to attain progress and the maintenance of our free institutions. Without its benefits our commonwealth would be bereft of efficient vital force, and in danger of the evils of absolutism. . . ."
>
> 87 *Minn.* 219.

Again, in *Sarlls, City Clerk v. State of Indiana, ex rel. Trimble, supra,* 201 Ind. 88, 106, the court observes:

> "The people have an inalienable right to organize and operate political parties, . . ."

This concept of the individual's right to freely associate with others at the political level is not a mere recent development. Thus De Tocqueville, writing a century ago, observed:

> "The most natural privilege of man, next to the

exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to be almost as inalienable in its nature as the right of personal liberty. . . ."

1 De Tocqueville, *Democracy in America, supra,* at p. 196.

Indeed, the Bill of Rights, viewed as a whole, obviously was designed to protect the individual in his political associations.

The First Amendment's guarantees of free speech, press and assembly clearly must include free political expression and free political assembly, for the fear of political oppression was a prime motivating factor in the adoption of those rights. Free political speech and assembly, in turn, must include the right to come together, choose candidates, campaign for public office and attempt to promote a group program. Otherwise those freedoms would be emptied of all significance, for our political processes are geared primarily to group action. It is only through such groupings that an individual may attain a measure of political significance. Only through such group action may political dissent be registered effectively.

This relationship of the Bill of Rights' guarantees to freedom of political association has been recognized by courts and writers alike.

See, *e. g.*,

Wieman v. Updegraff, 334 U. S. 183, 194-195 (1952);

Garner v. Board of Public Works, 341 U. S. 716, 727-728 (1951);

DeJonge v. Oregon, 299 U. S. 353, 364-365 (1937);

Whitney v. People of State of California, 274 U. S. 357, 379 (1927);

Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 252, 69 N. E. 2d 1115 (1946);

Emerson and Haber, *Political and Civil Rights in the United States* (1952), Ch. III, p. 248;

Abernathy, *Right of Association, supra*, 6 S. Car. Law. Q. 32, 33, 34 (1953-54);

Schattschneider, *American Government in Action* (1942) 1, 7.

As Emerson and Haber have noted:

"The United States Constitution nowhere explicitly recognizes a right to form political organizations. Indeed many of the founding fathers looked upon political parties with some suspicion, referring to them as 'factions.' Yet it is generally accepted that the rights in the First Amendment to freedom of speech, press and assembly, and to petition the government for redress of grievances, taken in combination, establish a broader guarantee to the right of political association. . . ."

Political and Civil Rights in the United States, supra, p. 248.

Again, Professor Abernathy states:

"Whether or not freedom of association is encompassed by freedom of assembly, it is at least a right cognate to the latter. And its importance in a democratic society cannot be overestimated. . . .

. . . . . .

". . . If parties are a natural result of freedom

operations of government, then the right to form parties must be protected to safeguard the basic rights of the people. . . ."

Abernathy, *Right of Association, supra,* pp. 33, 44.

In *Bowe v. Secretary of the Commonwealth, supra,* 320 Mass. 230, the court held that a law which would have prohibited labor unions and any person acting in their behalf from making political contributions was not a proper subject for an initiative petition. The court explained (320 Mass. at 252):

"One of the chief reasons for freedom of the press is to insure freedom, on the part of individuals and associations of individuals at least, of political discussion of men and measures, in order that the electorate at the polls may express the genuine and informed will of the people. Brandeis, J., in Whitney v. California, 274 U. S. 357, 375. Hughes, C. J., in Stromberg v. California, 283 U. S. 359, 369. Individuals seldom impress their views upon the electorate without organization. They have a right to organize into parties, and even into what are called 'pressure groups,' for the purpose of advancing causes in which they believe. They have a right to engage in printing and circulating their views, and in advocating their cause in public assemblies and over the radio. All this costs money, and if all use of money were to be denied them the result would be to abridge even to the vanishing point any effective freedom of speech, liberty of the press, and right of peaceable assembly."

But we need not look solely to the views of writers and other courts on this matter, for members of this Court

Thus, in *De Jonge v. Oregon, supra,* Mr. Chief Justice Hughes, speaking for the Court, stated (299 U. S. at 364-365):

"'Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution (citing cases). The right of peaceful assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in United States v. Cruikshank, 92 U. S. 542, 552: 'The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.' The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. (citing cases.)

"These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, [illegible] free assembly in order to maintain

the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Again, in *Whitney v. California, supra,* Mr. Justice Brandeis, in a concurring opinion joined by Mr. Justice Holmes, stated (274 U. S. at 379):

". . . I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the State court cannot be disturbed."

More recent opinions have voiced similar views. Thus, in *Garner v. Board of Public Works, supra,* 341 U. S. at 727-728, Mr. Justice Frankfurter, concurring and dissenting in part, declared:

"If this ordinance is sustained, sanction is given to like oaths for every governmental unit in the United States. Not only does the oath make an irrational demand. It is bound to operate as a real deterrent

How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by 'unlawful means'? All but the hardies may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people. Gregariousness and friendliness are among the most characteristic of American attitudes. Throughout our history they have been manifested in 'joining.' See Arthur M. Schlesinger, Sr., Biography of a Nation of Joiners, published in 50 American Historical Review 1, reprinted in Schlesinger, Paths to the Present, 23.

. . . . . .

"The needs of security do not require such curbs on what may well be innocuous feelings and associations. Such curbs are indeed self-defeating. They are not merely unjustifiable restraints on individuals. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service."

Again, in *Wieman v. Updegraff, supra,* Mr. Justice Frankfurter, in a concurring opinion joined by Mr. Justice Douglas, noted (344 U. S. at 194-195):

"The case concerns the power of a State to exact from teachers in one of its colleges an oath that they are not, and for the five years immediately preceding the taking of the oath have not been, members of any organization listed by the Attorney

the statute, as 'subversive' or 'Communist-front.' Since the affiliation which must thus be forsworn may well have been for reasons or for purposes as innocent as membership in a club of one of the established political parties, to require such an oath, penalizes a teacher for exercising a right of association peculiarly characteristic of our people. See Arthur M. Schlesinger, Sr., Biography of a Nation of Joiners, 50 Am. Hist. Rev. 1 (1944), reprinted in Schlesinger, Paths To The Present 23. Such joining is an exercise of the rights of free speech and free inquiry. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakeable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

Certainly the "free play of the spirit" alluded to by Mr. Justice Frankfurter in the case of teachers is no less essential in the case of lawyers.

IV.

The Present Case Represents a Serious Inroad on Freedom of Political Association Which Should Not Be Sanctioned by This Court.

Insofar as the State Bar Committee has rejected Petitioner's application because of his past innocent membership in the Communist Party, there has been a serious infringement of Petitioner's right of free political association.

Clearly, that right creates an area of political activity which is protected from action and inquiry by governmental and quasi-governmental agencies. The existence of such protected areas has been recognized by this Court. Thus, in *Quinn v. United States,* 349 U. S. 155, 161 (1955), Mr. Chief Justice Warren, speaking for the Court, stated:

> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here."

If such limitations are to be imposed upon the United States Congress, with all of its powers and prerogatives, surely a Committee of the State Bar, whose sole function

is to determine the qualifications of candidates for admission to the Bar, cannot be permitted to roam at will through the area of political beliefs and associations. Even less may such a Committee refuse admission to the Bar on the basis of such a foray.

Conclusion.

The right of free political association for which we are contending might well be described as the "touchstone of democracy".

Such a right finds no place in a totalitarian regime. Indeed, the absence of free political association and the resulting one-party concept furnish a common denominator for the totalitarian countries.

In the dictatorial regimes, freedom of political association is unthinkable. It is equally unthinkable that our own constitutional democracy could continue to function without this basic freedom. As one writer has observed:

> "Freedom to think and speak will avail little unless it is supported by the further freedom to assemble peaceably for discussion, in large groups or small, and to associate together for the common purposes discovered by discussion. Not even the all-powerful dictator can enforce directly a ban on thinking. But by rigid control of all the means of communication, and of the right of public meeting and association, he can go far to ensure that the thinker will keep his thoughts to himself. Liberal democracy is dependent also on freedom of peaceable assembly and association."
>
> Corry, *Elements of Democratic Government, supra,* pp. 324-325.

Nevertheless, the past few years have witnessed repeated actions on the part of governmental and quasi-governmental agencies tending to undermine the right of free political association.

Professor Abernathy has aptly commented on the dangers of such a trend[1]:

> ". . . At the very least Americans will become, indeed they have become, so cautious about joining associations that only those ultra-acceptable ones can recruit new members. And the contributions to a democratic society which arise from free association will be severely reduced if not lost.
>
> . . . . . .
>
> ". . . The Communist threat is a real and present danger and it cannot be ignored. But neither can Americans afford to destroy the whole democratic society in order to root out one evil. The contributions made by exercise of the broad freedom to associate are too important to the proper operation of a democratic system to be seriously impaired by hasty, ill-considered measures."
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> Abernathy, *Right of Association, supra,* 6 S. Car. Law Q., at pp. 72-73, 77.

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[1]Professor Abernathy notes the following extreme example:

". . . The City of Birmingham, Alabama, passed an ordinance in 1950 which provided a $100 fine and a maximum of 180 days in jail for each day that a known Communist remained in the city. The ordinance further provided that membership in the Communist Party would be presumed if a person 'shall be found in any secret or non-public place in voluntary association or communication with any person or persons established to be or to have been members of the Communist Party.' This is guilt by association with a vengeance." Abernathy, *Right of Association, supra,* at page 61.

The present case, which represents a further step in this undermining process, affords this Court an excellent opportunity to halt this dangerous trend and revitalize the right of free political association. We respectfully urge this Honorable Court to take advantage of the opportunity thus presented and thereby vindicate this fundamental right.

Respectfully submitted,

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